Tentative Rulings for August 7, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

10CECG01295 ***Cardenas v. Vasquez et al*. (Dept. 402.)**

11CECG02923 ***Hagopyan v. Farmer's Insurance Group* (Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

09CECG02822 ***Sherrick v. CBB Construction* is continued to Thursday, August 23, 2012 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: ***Clifford Rice, et al. v. American Airlines Federal Credit Union, et al.***
Superior Court Case No. 12 CECG 00836

Hearing Date: Tues., Aug. 7, 2012 (**Dept. 402**)

Motion: Defendant American Airlines Federal Credit Union's Demurrer to the Complaint.

Tentative Ruling:

To SUSTAIN the Demurrer to the first and second causes of action, WITH LEAVE TO AMEND. Plaintiffs shall have 10 calendar days' leave within which to file a First Amended Complaint which corrects the defects noted below. Any new allegations shall be set forth in **boldface** type. Time shall run from the clerk's service of the minute order.

Analysis:

Demurrer

The Credit Union argues correctly that under California law, a lien that is recorded "first in time" is "first in right" and is entitled to priority. (**Thaler v. Household Finance Corp.** (2000) 80 Cal.App. 4th 1093, 1099.) Here, the Complaint alleges that the Credit Union's lien was recorded first on 6/20/06 and that the Prospect Mortgage and Lauretta Rice liens were recorded later on 6/3/11. Therefore, unless the Credit Union's lien is somehow invalid, it is entitled to priority over the Prospect and Rice liens.

The Credit Union argues correctly that Plaintiffs' only basis for attacking the validity of the Credit Union's lien is that - - (1) Plaintiffs relied tax form showing that the Credit Union had cancelled King's debt and (2) that King had obtained a discharge of debts in bankruptcy. The Credit Union argues correctly that these facts fails to state a claim for declaratory relief or quiet title.

The Credit Union argues correctly that issuance of a form 1099-C is done to comply with federal tax reporting requirements and does not, as a matter of law, operate to cancel or legally discharge a debt. (**In re: Zilka** (Bankr. W.D. Pa. 2009) 407 B.R. 684, 688.) The Credit Union argues correctly that Plaintiffs have alleged no intentional voluntary act, consistent with surrendering the instrument, destroying it, or entering into a signed agreement not to sue. (Cal. U. Comm. Code § 3604.)

Furthermore, even assuming the form legally cancelled King's personal liability (which it did not), there was no language in the form from which a reasonable person could conclude that the Credit Union was releasing its lien on the property that constituted security for the underlying debt.

The Credit Union argues correctly that even after a debtor obtains a bankruptcy discharge to extinguish his personal liability for a mortgage, the lender's security interest is not cancelled, so the lender may still foreclose on the property. (**Johnson v. Home State Bank** (1991) 501 U.S. 78, 82-83.)

Plaintiffs' Opposition

In Opposition, Plaintiffs Clifford Rice, Tamra Butler-Rice, and Prospect Mortgage LLC raise 5 arguments against the Demurrer.

First, Plaintiffs argue that their claims are properly pled, because if there is no debt, there can be no lien. Plaintiffs allege that the issuance of the 1099-C form cancelled the debt, so that the Credit Uniion's lien was extinguished. But this is simply incorrect, as a matter of law, under **Zilka** and the cases cited therein.

Second, Plaintiffs argue that the Credit Union has cited only non-controlling non-California cases. This argument fails because the federal cases that Plaintiff cites are persuasive authority on the subject of the IRS regulations and applicable federal bankruptcy law.

Third, Plaintiffs argue that under Arizona law, issuance of a 1099-C form is prima facie evidence that a debt was discharged under state law. (**AmTrust v. Fossett** (2009) 223 Ariz 438.) The court is unable to access this case online. And Plaintiffs have not provided the court with a copy of this case. (**CRC 3.1113 (j)(1)**.)

But the problem with this argument is that the Arizona case does not establish how California law treats this issue. Furthermore, even assuming the 1099-C form is evidence that a private debt was cancelled, the Arizona ruling is still irrelevant. The key issue in this case does not revolve around cancellation of a private debt. In this case, Plaintiffs contend that the 1099-C form extinguished the Credit Union's security interest. And Plaintiffs make no showing that the **Amtrust** case expressly holds that issuance of a 1099-C form extinguishes a lender's security interest in property subject to a deed of trust.

Plaintiffs argue that under **In re: Crosby** (Bankr. D. Ka. 2001) 261 B.R. 470, 474, the court held that it was unfair for a creditor to issue an erroneous 1099-C and still seek to collect on a debt. The court held that If the 1099-C had been issued in error, then the creditor was required to issue a corrected 1099-C before initiating collection measures. To hold otherwise would have unfairly burdened the debtor with an incorrect tax liability. This case is distinguishable because, in this case, there is no allegation in the Complaint that the 1099-C form was issued in error. Nor is there any allegation that the Credit Union is seeking to collect

money from King personally. Here, the allegation is that the Credit Union is wrongfully maintaining its security interest under the deed of trust.

Fourth, Plaintiffs argue that they reasonably relied on the 1099-C form. But the problem with this argument is that the alleged reliance was unreasonable as a matter of law, because based on **Zilka**, the issuance of the form does not constitute proof that a creditor has cancelled its underlying security interest.

Fifth, Plaintiffs argue that is was not the bankruptcy that extinguished the Credit Union's lien, but rather that it was the issuance of the 1099-C form that extinguished the Credit Union's lien. As noted above, this argument fails as a matter of law.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/3/2012 .

(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Butts et al. v. Alta Irrigation Dist.***
Superior Court Case No. 12CECG00117

Hearing Date **August 7, 2012 (Dept. 403)**

Motion: Opposition to Order Designating Case Provisionally Complex

Tentative Ruling:

To grant and set aside the 5/21/12 order provisionally designating this case as complex.

Explanation:

This case clearly is not "provisionally complex" within the meaning of Cal. Rules of Court, Rule 3.400(c). Among the factors to be considered by the court in determining whether a case is otherwise complex are those set forth in Cal. Rules of Court, Rule 3.400(b):

1. Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
2. Management of a large number of witnesses or a substantial amount of documentary evidence;
3. Management of a large number of separately represented parties;
4. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
5. Substantial post judgment judicial supervision.

Having considered the arguments of the parties, the court finds that these factors do not support designating the case as complex.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 8/6/12 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Foster v. Gardini***
Superior Court Case No.: 10CECG03814

Hearing Date: August 7, 2012 (**Dept. 403**)

Motion: By Plaintiff Joe Edward Foster to compel the workers' compensation carrier, Zenith Insurance Company, to pay a pro rata share of its lien to Plaintiffs' attorney, Robert Gilmore, pursuant to the common fund doctrine

Tentative Ruling:

To grant, with the workers' compensation lien of Zenith Insurance Company to be offset by 40 percent of the amount of attorney's fees and costs incurred by Plaintiff, or $87,514.65. Plaintiffs must comply with California Rules of Court, rule 3.1385, forthwith. The court has not considered Zenith Insurance Company's opposition filed late on August 1, 2012. (Cal. Rules of Court, rule 3.1300(d).)

Explanation:

Intervenor Zenith Insurance Company will be required to reduce its workers' compensation lien. (Lab. Code, §3860; *Quinn v. State* (1975) 15 Cal.3d 162, 167; *Hartwig v. Zacky Farms* (1992) 2 Cal.App.4th 1550, 1557.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK (Judge's initials) on 8/6/12 (Date).

03

Tentative Ruling

Re: ***Hudson v. Yates***
Case No. 12 CE CG 01097

Hearing Date: August 7th, 2012 (Dept. 502)

Motion: Respondents' Demurrer to Second Amended Complaint

Tentative Ruling:

To overrule the demurrer. (CCP § 430.10.) To order respondents to file their answer to the complaint within 10 days of the date of service of this order.

Explanation:

First, it does not appear that petitioner has received timely notice of the demurrer. The demurrer was originally served on the wrong address, since respondents sent it to PO Box **5130** in Delano, rather than petitioner's actual address of PO Box **5103**.

Respondents then re-served petitioner at his correct address on July 19th. (See Proof of Re-Service filed July 26th, 2012.) However, since service was by mail, respondents needed to serve petitioner at least 21 days before the hearing. (CCP § 1005(b).) They served him only 19 days before the hearing, which means that he may not have had adequate time to review the demurrer and draft opposition before the deadline for filing opposition. Since petitioner has not filed opposition, the court cannot assume that he was not prejudiced by the delay. Therefore, the court declines to hear the merits of the demurrer.

In addition, respondent Pleasant Valley Prison has now been defaulted, and thus has no standing to demur to the complaint.

"Entry of defendant's default instantaneously cuts off its right to appear in the action. The defendant is 'out of court.' It has no right to participate in the proceedings until either (a) its default is set aside (in which event, it may respond to the complaint), or (b) a default judgment is entered (in which event, it may appeal). [*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc*. (1984) 155 CA3d 381, 385–386, 202 CR 204, 207]" (Weil & Brown, *supra*, Ch. 5-A, § 5:6.)

Here, PVSP's default was taken on May 30th, 2012, over a month before respondents filed their demurrer. Therefore, PVSP has no standing to bring a demurrer, and the court cannot consider the demurrer to the extent that it applies to PVSP. On the other hand, the court can still consider the demurrer as it applies to the other respondents, who have not yet been defaulted.

Also, the demurrer is procedurally defective, because the notice of demurrer and demurrer do not list any of the statutory grounds for bringing a demurrer. Respondents demur based on theories that (1) petitioner failed to exhaust his administrative remedies, and (2) petitioner's complaint is actually a motion for reconsideration of the court's order sustaining the earlier demurrer. However, these are not recognized statutory grounds for a demurrer.

Under CCP § 430.10, the following are grounds for demurring to a complaint:

(a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.

(d) There is a defect or misjoinder of parties.

(e) The pleading does not state facts sufficient to constitute a cause of action.

(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.

(h) No certificate was filed as required by Section 411.35.

(i) No certificate was filed as required by Section 411.36. (Code Civ. Proc., § 430.10.)

"A demurrer can be taken only upon the grounds specified in the Code." (Weil & Brown, Cal. Prac. Guide, Civ. Pro. Before Trial, Ch. 7(I)-A, § 7:29.)

Respondents' demurrer does not raise any of these statutory grounds, and the grounds that they do raise are not valid grounds for demurrer. Since the demurrer is not based on any of the recognized statutory grounds, the court cannot consider it. Therefore, the court declines to hear the merits of the demurrer.

However, even if the court does consider the merits of the demurrer, the court still intends to overrule the demurrer. While respondents contend that the complaint is insufficiently pled because petitioner has not exhausted his administrative remedies at the prison before filing the complaint, here it does not

appear that the gravamen of the petition relates to the confiscation of petitioner's property or even the alleged failure to process his appeals. Instead, petitioner is complaining that the trial court in the original case improperly sustained the prior demurrer after the defendants had already been defaulted. (See Complaint, IT-1, pp. 1-3.) Petitioner is thus challenging the validity of the trial court's order, not a decision or action at the prison. As such, there is no administrative remedy available to petitioner that would grant him any relief. Consequently, petitioner does not have to show exhaustion of administrative remedies in order to state a claim here.

Respondents also argue that the second amended complaint is nothing more than an improper motion for reconsideration of the court's order sustaining the previous demurrer, and that petitioner has not shown any new facts, circumstances, or law to justify reconsideration. (CCP § 1008(a).) However, it does not appear that the SAC is an improper motion for reconsideration. Instead, petitioner appears to be seeking an order declaring that the judgment and dismissal in the prior case was improperly entered because the court lacked jurisdiction to hear the demurrer after the respondents were defaulted. If petitioner is correct, then the trial court's order sustaining the demurrer and dismissing the case may have been void for lack of jurisdiction, and is subject to collateral attack at any time.

"Entry of default ousts the court of jurisdiction to consider any motion other than a motion for relief from default." (Weil & Brown, *supra*, Ch. 5-A, at § 5:7.)

"When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation.]" (*People v. American Contractors Indem. Co.* (2004) 33 Cal.4th 653, 660.)

Here, it is possible that the petitioner may be able to collaterally attack the judgment and dismissal on the ground that it was void because the court lacked jurisdiction to consider the demurrer. Therefore, the court intends to overrule the demurrer and order respondents to file their answer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **8-6-12**

Issued By: _____ **on** _____.

(Judge's Initials) (Date)

(5)

Tentative Ruling

Re: ***Maciel v. Lopez***
Superior Court Case No. 10 CECG 00822

Hearing Date: August 7, 2012 **(Dept. 403)**

Application: Entry of Default Judgment

Tentative Ruling:

The matter is taken off calendar. Local Rule 2.1.14 requires the moving party to file a default prove-up packet, including supporting declarations and evidence, at least **5 court days prior** to the hearing. Plaintiff has not complied with this rule. A new hearing date must be calendared and Plaintiff must comply with Local Rule 2.1.14.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure §1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 8/6/12 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Artiaga v. Foster Farms***
Superior Court Case No. 11CECG02109

Hearing Date: August 7, 2012 (Department 501)

Motion: by plaintiff for approval of class action settlement and for certification of class action.

Tentative Ruling:

To continue to September 11, 2012 for further filings

Explanation:

Accompanying this motion are two volumes of an "Index to Exhibits to Declaration of Luis Miranda." The first volume was filed in violation of Fresno Superior Court Rule 1.1.10, which states:

> "B. California Rules of Court, rule 3.1110(e), requires all pages of each document and exhibit filed with the Court to be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read. To fully comply with rule 3.1110(e) in this court, parties filing papers attached together at the top by prong fasteners, must not use prong fasteners with a capacity larger than 2" so that the bound documents can fit into a standard court file. Excepted from this requirement are exhibits or documents that exceed 2" or that would otherwise be destroyed if they were torn apart to comply with the 2" capacity limit."

Any one exhibit that exceeds two inches in thickness may be filed as its own volume. However, here moving parties have combined several exhibits into a giant eight and one-half inch thick document. This document is too large to be filed in any court file or even in the specially purchased accordion folders used by the Court. It is also very difficult to turn pages and see all of a given page due to the thickness of the filing.

Said document need be broken down in to volumes which comply with the rule and resubmitted on or before August l7, 2012.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith **on** **8/6/12**.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***The Cambrian Group, Inc. v. A&A Plastering Co., Inc.***
Superior Court Case No.: 09CECG03593

Hearing Date: August 7, 2012 (**Dept. 402**)

Motion: Demurrer to, and motion to strike portions of, second amended complaint, by Defendant Tom Besmer Construction, Inc.

Tentative Ruling:

To overrule and to deny, with Defendant Tom Besmer Construction, Inc. ("Besmer") granted until Friday, August 10, 2012, to answer.

Explanation:

There are no dates alleged in the complaint that show "clearly and affirmatively" that the action is barred by the statute of limitations. (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) There's nothing on the face of the complaint that would indicate that defective framing is or is not a part of the stucco problem, e.g., a different instrumentality. In ruling on a demurrer, the court can consider only matters that appear on the face of the complaint or matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

There's nothing on the face of the second amended complaint which would indicate that Plaintiffs The Cambrian Group, Inc., and Quail Lake Properties, LLC ("Plaintiffs") do not have standing. (*Carsten v. Psychology Examining Committee* (1980) 27 Cal.3d 793, 795-796.) For the purpose of testing the sufficiency of the cause of action, a cause of action admits the truth of all material facts properly pleaded (e.g., all ultimate facts alleged, but not contentions, deductions, or conclusions of fact or law). (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 966-967.)

The breach of contract cause of action alleges that Plaintiffs entered into written contracts with Besmer for provision of quality framing materials and to construct the framing of the homes at issue in the project in a good and workmanlike manner. (Second amended complaint, ¶44.) The negligence cause of action alleges that Besmer owed Plaintiffs a duty of care as intended purchasers and users of the house frame to supply and construct the house frame in such a way as to avoid injury. (Second amended complaint, ¶50.) The breach of express warranty cause of action alleges that Besmer made warranties through multiple contracts and other documents to Plaintiffs and that

Plaintiffs were in direct privity of contract with Besmer. (Second amended complaint, ¶54.) This is enough for alleging standing.

The motion to strike is denied on the same basis that the demurrer is overruled.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 8/3/2012.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Pedro v. Galvan et al.***
Superior Court Case No. 11 CECG 01730

Hearing Date: August 7, 2012 **(Dept. 501)**

Motion: Demurrer and Motion to Strike By Defendants Fowler Packing Co. et al.

Tentative Ruling:

To sustain the general demurrers to the sixth and seventh causes of action *with leave* to amend. The motion to strike is rendered moot. An amended complaint is to be filed within ten days of notice of the ruling--running from service by the clerk of the minute order. Only those allegations in the second amended complaint that are new or different from those in the first amended complaint are to be set in boldface type.

Explanation:

Judicial Council of California Civil Jury Instructions

CACI 400 Negligence—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s negligence. To establish this claim, [*name of plaintiff*] must prove all of the following:

1 That [*name of defendant*] was negligent;
2 That [*name of plaintiff*] was harmed; and
3 That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm

CACI 1903 Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she/it] was harmed because [*name of defendant*] negligently misrepresented an important fact. To establish this claim, [*name of plaintiff*] must prove all of the following:

1 That [*name of defendant*] represented to [*name of plaintiff*] that an important fact was true;
2 That [*name of defendant*]'s representation was not true;
3 That [although [*name of defendant*] may have honestly believed that the representation was true,] [[*name of defendant*]/he/she] had no reasonable grounds for believing the representation was true when [he/she] made it;

4 That [*name of defendant*] intended that [*name of plaintiff*] rely on this representation;
5 That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;
6 That [*name of plaintiff*] was harmed; and
7 That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm

First, Plaintiff is correct in her assertion that she is not confined to remedies under FEHA. Because the FEHA expressly does not preempt common law tort claims, the FEHA's remedies are not exclusive and do not bar a tort claim for wrongful discrimination in violation of public policy. See *Stevenson v. Sup.Ct. (Huntington Memorial Hosp.)(1997)* 16 C4th 880 at 885. Accordingly, there is no basis to treat the common law causes of action as brought under FEHA.

Second, the cause of action for negligence appears duplicative of the cause of action for negligent misrepresentation. Compare ¶¶ 66-68 with 80-82. The causes of action are not identical. In fact, negligent misrepresentation is a species of fraud & deceit. See Civil Code § 1710 and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408.

Third, the cause of action for negligent misrepresentation does not really fit the scenario. One of the elements is an important fact. But, a promise to speak to someone is not a fact. Compare CACI 1903 to CACI 1902—False Promise:

[*Name of plaintiff*] claims [he/she] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:

1 That [*name of defendant*] made a promise to [*name of plaintiff*];
2 That this promise was important to the transaction;
3 That [*name of defendant*] did not intend to perform this promise when [he/she] made it;
4 That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;
5 That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;
6 That [*name of defendant*] did not perform the promised act;
7 That [*name of plaintiff*] was harmed; and
8 That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/its] harm

In the instant case, more research needs to be done regarding the role of the moving individual Defendants vis-à-vis Galvan's position as "on the job" supervisor as well as their authority to deal with any sexual harassment that occurred at Fowler Packing and their duty towards the Plaintiff in her capacity as a worker on their premises. The general demurrers will be sustained with leave to amend. The motion to strike is rendered moot.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith **on 8/6/12 .**

(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Bakari v. Foster Poultry Farms, Inc.***
Case No. 11 CE CG 04408

Hearing Date: August 7th, 2012 (Dept. 502)

Motion: Defendant's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the demurrer to the first and fourth causes of action, without leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty. (CCP §§ 430.10(e), (f).) To overrule the demurrer to the second and third causes of action.

Defendant shall serve and file its answer to the first amended complaint within 10 days of the date of service of this order.

Explanation:

First Cause of Action: Plaintiff's allegations are vague and uncertain, and fail to state all of the required elements to support a fraud cause of action.

The elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167 (Small), 173.) In California, fraud must be pled specifically; general and conclusory allegations do not suffice. (*Id*. at 184.) Thus "the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect." (*Ibid*.) This particularity requirement necessitates pleading facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Id.* at 184, citing *Lazar v. Superior Court, supra*, 12 Cal.4th 631, 645.)

Here, plaintiff alleges three incidents that he claims constituted fraud by defendant's employees. (FAC, ¶¶ 28-37.) The incidents generally concerned unfavorable reports or write-ups against plaintiff for allegedly refusing to help co-workers or obey orders, and defendant's alleged failure to investigate the truth about the incidents. However, plaintiff has not alleged that he relied upon any of the alleged misrepresentations to his detriment. Indeed, it is clear from the allegations of the FAC that plaintiff did not believe the complaints against him, and demanded further investigations of the allegations. Therefore, these incidents cannot form the basis of a fraud cause of action.

Plaintiff also alleges that defendant engaged in "identity theft" and "embezzlement" against plaintiff, apparently by falsifying plaintiff's employment application from 2002 to show that plaintiff worked for defendant rather than a third party. (FAC, ¶¶ 38-41.) Again, however, plaintiff does not allege that he relied on these misrepresentations to his detriment. In fact, plaintiff admits that he was not even aware of the alleged misrepresentations until his termination in 2010. (FAC ¶ 41.) Therefore, plaintiff cannot state a fraud claim based on the alleged forgery of his employment application.

In addition, plaintiff alleges an incident in which a co-worker allegedly spat in his food, and defendant failed to investigate the incident thoroughly and impartially. (FAC ¶¶ 24-25.) However, plaintiff alleges no misrepresentations by defendant or its agents, and no reliance or resulting damage on plaintiff's part. Therefore, this incident cannot form the basis for a fraud claim. As a result, the court intends to sustain the demurrer to the first cause of action.

Furthermore, since plaintiff has already been given one chance to amend his complaint, and has failed to allege any facts to cure the defects in his fraud claim, the court intends to sustain the demurrer without leave to amend. It does not appear that plaintiff will be able to allege any new facts that would allow him to state a claim.

Second Cause of Action: Plaintiff's complaint does appear to have stated sufficient facts to constitute a valid claim for race discrimination.

First of all, to the extent that plaintiff seeks to bring a claim under Title VII of the Civil Rights Act of 1964, plaintiff has not alleged that he has exhausted his administrative remedies. (See 42 USC §2000e-8(b).) Therefore, the complaint fails to state a claim under the Federal Civil Rights Act.

However, plaintiff does attach part of his claim to the DFEH, which indicates that he apparently filed a claim with the DFEH, so it appears that he exhausted his administrative remedies under the California Fair Employment and Housing Act.

Both Title VII of the Civil Rights Act of 1964 and California's Fair Employment Housing Act (FEHA) broadly prohibit employment discrimination against individuals because of race, color, religion, sex, or national origin. (42 USC §2000e-2 and California Government Code section 12940.) Plaintiff may prove discrimination through disparate treatment or disparate impact. Disparate treatment is intentional discrimination against one or more persons on prohibited grounds (for example, treating similarly situated individuals differently in their employment because of a protected characteristic). (*International Brotherhood of Teamsters v. United States* (1977) 431 US 324, 335-336.) In a disparate treatment case it must be shown that intentional discrimination was the determinative factor in the adverse employment action: whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait had a determinative influence on

the outcome. (*Hazen Paper Co. v. Biggins* (1993) 507 US 604, 610.) Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity; a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate treatment case. (*Raytheon Co. v. Hernandez* (2003) 540 US 44, 52-53.)

Here, plaintiff alleges that defendant ran a "corrupt workplace" and that he was targeted because of his ethnicity. He alleges that he was the only African-American on the staff. (FAC ¶ 44.) Plaintiff alleges that he was discriminated against him by hiring him because of his race and his previous home address. (*Id*. at ¶ 46.) However, the alleged fact that plaintiff was hired because of his race is not an adverse impact that would support a claim of racial discrimination.

Plaintiff also claims that paragraphs 12-15 describe a situation where "Defendant's retaliatory actions are distinctly coherent to ethnic changes to Plaintiff's personal information." (*Id*. at ¶ 47.) This confusing allegation appears to refer to plaintiff's "Afrocentric changes to his personal information", and the subsequent complaints against him by co-workers and supervisors, as well as his eventual termination. (*Id*. ¶ 12-15.) However, this allegation is too vague and confusing to state a claim, as it is not even clear what plaintiff means by "Afrocentric changes to his personal information", or how the resulting complaints and eventual termination were related to the changes.

However, plaintiff also alleges that defendant engaged in "retaliatory fraud" to terminate plaintiff. (FAC ¶ 49.) He claims that the lack of action against his co-workers and the use of fraudulent documents to terminate plaintiff shows that defendant orchestrated a scheme with plaintiff's co-workers to terminate plaintiff through fraudulent means, thus clearly violating plaintiff's civil rights. (*Id*. at ¶ 50.) Apparently, plaintiff is alleging that defendant used a pretext to terminate plaintiff, and that defendant's actual motive was racial discrimination. Plaintiff has also alleged that he was a member of a protected racial minority. (*Id*. at ¶ 44.) Plaintiff alleges that he was denied promotions in violation of his civil rights and the Civil Rights Act of 1964. (*Id*. at ¶ 51.) Defendant also failed to take any action in response to the spitting incident, which again shows racial discrimination and violation of plaintiff's civil rights. (*Id*. at ¶ 52.) Plaintiff also claims that he was not allowed to file a grievance of this incident. (*Id*. at ¶ 53.) In addition, he was punished for not having an ID badge, which was a rule that seems to have been created solely to punish plaintiff. (*Id*. at ¶ 54.) Other employees also forgot their ID cards, but they were not punished. (*Id*. at ¶ 55.) Thus, plaintiff was discriminated against by the application of the rule. (*Ibid*.) Defendant also failed to take any action when plaintiff was harassed by his co-workers. (*Id*. at ¶ 58.) Ultimately, defendant forged documents as a pretext to terminate plaintiff. (*Id*. at ¶ 59.)

While plaintiff does not allege any facts showing that defendant's actions were motivated by racism, such facts are likely to be solely within defendant's possession, and thus the court will not require plaintiff to allege any detailed facts showing racially discriminatory motive. Plaintiff has adequately alleged facts showing that he was a member of a protected class, and that he was subjected to discriminatory and adverse actions based on his membership in the protected class. Therefore, since plaintiff's second cause of action, when read liberally and in its entirety, appears to allege that defendant engaged in a scheme to discriminate against plaintiff and ultimately terminate him because of his race, the court intends to overrule the demurrer to the second cause of action.

Third Cause of Action: The plaintiff's third cause of action states a valid claim for wrongful discharge in violation of public policy.

"Apart from the terms of an express or implied employment contract, an employer has no right to terminate employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision. [Citation.] An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee. [Citation.]" (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.)

"In order to sustain a claim of wrongful discharge in violation of fundamental public policy, [plaintiff] must prove that his dismissal violated a policy that is (1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision. [Citation.]" (*Id*. at 1256.)

Here, plaintiff's FAC alleges that plaintiff was terminated as a result of racial discrimination, which clearly would violate public policy as embodied by statutory and constitutional law. (See FAC ¶ 64, citing the Civil Rights Act of 1964 Title VII.) Plaintiff also alleges that defendant forged documents in order to fabricate an excuse to terminate plaintiff based on his alleged falsification of his employment application. (*Id*. at ¶ 63.) He claims that this forgery was in violation of Civil Code § 1572 and Government Code § 12940. (*Ibid*.) Since racially discriminating against an employee would obviously be a violation of fundamental public policy, plaintiff has alleged sufficient facts to state a claim for wrongful termination in violation of public policy. Therefore, the court intends to overrule the demurrer to the third cause of action.

Fourth Cause of Action: Plaintiff's fourth cause of action attempts to state a claim for intentional infliction of emotional distress.

The essential elements of an intentional infliction of emotional distress claim are " '(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' [Citation.] 'Conduct, to be "outrageous" must be so extreme as to exceed all bounds of that usually tolerated in a civilized society.'

[Citation.]" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1259.)

Here, plaintiff claims that he was racially discriminated against by defendant's employees, resulting in a hostile work environment, and that his complaints fell on deaf ears. (FAC, ¶ 66.) He also claims that defendant unlawfully terminated him instead of exercising its right to dismiss him without cause, which caused him to suffer depression, loss of income and other problems. (*Id*. at ¶ 67.) He also alleges that the judicial system has been biased in favor of defendant and against plaintiff, and that the Unemployment Insurance Department has denied his claims and refused to answer his emails. (*Id*. at ¶ 69.)

However, to the extent that plaintiff claims that his termination caused him severe emotional distress, such a claim does not state a cause of action for intentional infliction of emotional distress. Firing an employee by itself does not constitute "outrageous" conduct, even if the firing was without cause. (See *Buscemi v. McDonnell Douglas Corp*. (9th Cir. 1984) 736 F2d 1348, 1352 (applying Calif. law)—plaintiff was allegedly fired on a pretext, without cause and in a "callous and insensitive manner".)

"Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.)

Thus, plaintiff cannot state a claim for intentional infliction of emotional distress based on his termination. Nor has he alleged any other outrageous conduct by his employer that would support a claim for IIED. Most of the other allegedly discriminatory conduct was committed by lower level employees of defendant, and plaintiff has not alleged that defendant or its managing agents did anything discriminatory or outrageous to him. Decisions not to investigate plaintiff's complaints or to write up plaintiff for disciplinary infractions would fall under the category of management decisions, which are not generally a valid basis for an IIED claim. (*Janken, supra*, at 80.) Therefore, plaintiff has failed to state a claim for IIED.

Nor does it appear that plaintiff will be able to allege new facts to support an IIED claim, since he has not filed an opposition or explained what other facts he could allege to state a valid claim. Therefore, the court intends to sustain the demurrer to the fourth cause of action without leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **8-6-12**

Issued By: _____ on _____.

(Judge's Initials) (Date)

(19) **Tentative Ruling**

Re: ***Huntington v. St. Agnes***
Superior Court Case No. 11CECG01911

Hearing Date: August 7 2012 (Department 403)
(Please Note Change in Department)

Motion: by defendant Karandeep Singh, M.D. for summary judgment

Tentative Ruling:

To grant.

Explanation:

A formal non-opposition and an expert testifying that this defendant met the standard of care is sufficient to grant the motion. See, e.g., *Bushing v. Fremont Medical Center* (2004) 117 Cal.App.4th 493.

"Whenever the plaintiff claims negligence in the medical context, the plaintiff must present evidence from an expert that the defendant breached his or her duty to the plaintiff and that the breach caused the injury to the plaintiff." *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123. Having chosen not to do so here, plaintiff has conceded the validity of the motion.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 8/6/12.
(Judge's initials) (Date)